

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-4083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR

Petitioner,

v.

MARQUETTE CEMENT MANUFACTURING CO.,
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JOINT APPENDIX

WILLIAM J. KILBERG
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

MICHAEL H. LEVIN
Counsel for Appellate Litigation

ALLEN H. FELDMAN
Assistant Counsel for
Appellate Litigation

NANCY L. SOUTHARD
Attorney

U.S. DEPARTMENT OF LABOR
Washington, D.C. 20210
(202) 523-6818

ATTORNEYS FOR APPELLANT

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McDermott, Will & Emery
111 Monroe Street
Chicago, Illinois 60603

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Department of Justice
Washington, D.C.

ATTORNEYS FOR APPELLEES

B
P/S



PAGINATION AS IN ORIGINAL COPY

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205 Midtown Plaza
700 E. Water St.
Syracuse, N.Y. 13210

6010

TO: Mr. Loyd Roulette
Plant Manager
Marquette Cement Manufacturing Company
P. O. Box 31 Route 9W
Catskill, New York 12414

Subject: Citation(s) for Alleged Occupational Safety and Health Violation(s)

An inspection of a place of employment has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, (29 U.S.C. 651 *et seq.*). The nature of such alleged violation(s) is described in the enclosed citation(s) with references to applicable standards, rules, regulations and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each alleged violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days*, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act. The Act provides for penalties for violation of the posting requirements.

You are hereby notified, or will soon be notified, whether or not penalty(ies) will be proposed as a result of the cited violation(s). You have the right to contest any or all parts of either the citation(s) or the proposed penalty(ies) before the Occupational Safety and Health Review Commission. The Review Commission is an independent agency with authority to issue decisions regarding citation(s) and proposed penalty(ies). If you do contest, you should submit a letter to the Area Director at the address shown above within 15 working days* after receipt of the certified mail notice regarding proposed penalty(ies). If you fail to contest within the 15 working day period, the citation(s) and the penalty(ies) as proposed, shall be deemed to be a final order of the Review Commission and not subject to review by any court or agency.

If an employer contests the citation, the abatement period specified therein does not begin to run until the date of the Commission's final order in the case *PROVIDED* the employer initiated his contest in good faith and not solely for delay or avoidance of penalties.

You have a right to request a discussion with the Area Director concerning any results of the inspection (abatement dates, citations, penalties, etc.). Please direct correspondence to, or call, the Area Director at the address shown at the top of this letter. A request for an informal discussion cannot extend the 15 working day period allowed for filing a notice of contest. Therefore, a request for an informal discussion should be brought to the attention of the Area Director prior to the end of the 15 working days allowed for filing a notice of contest, preferably as soon as possible.

An employee or representative of employees may file a notice (letter) to contest the reasonableness of the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. A follow-up inspection may be made for the purpose of ascertaining that the employer has posted the citation(s) as required by the Act and corrected the alleged violations. Failure to correct an alleged violation within the abatement period may result in further proposed penalties for each day the alleged violation has not been corrected. Timely correction of an alleged violation does not affect the initial proposed penalty.

Correction of alleged violations which have an abatement period of 30 days or less should be reported in writing to the Area Director promptly upon correction. Reports of corrections should show specific corrective action on each such alleged violation and the date of such action. On alleged violations having an abatement date of more than 30 days, a written progress report should be submitted each 30 days. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director should be so advised.

The Act provides that whoever knowingly gives false information is subject to a fine up to \$10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address shown above.

*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

3.	Citation(s) Enclosed	Pages
	Quantity	
	Nonserious	1
	Serious	
	Willful	
	and/or	
	Repeated	
4.	Notification of Proposed Penalty enclosed	
	<input type="checkbox"/> Yes <input type="checkbox"/> No	

U.S. Department of Labor
by Area Director

5.

Date September 14 1972

200 Madison Plaza
700 E. Water St.
Syracuse, N.Y. 13210

TO: Marquette Cement Manufacturing Company
P. O. Box 31 Route 9W
Catskill, New York 12414

3. Citation Number 1

4. Page 1 of 5. 1

6. TYPE OF ALLEGED VIOLATION(S): SERIOUS

7. An inspection was made on September 5 19 73 of a place of employment located at:
8. above address and described as follows
9. Passageway Between Kiln Building and Crane Storage Building

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1.	Section 5(a)(1) of the Occupational Safety and Health Act	The employer failed to furnish to each of his employees working near the passageway between the Kiln Building and the Crane Storage Building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as; providing danger signs to alert employees that an immediate hazard exists from falling bricks; providing barricades to deter and prevent employees from entering the brick dumping area; providing an enclosed chute for the dumping of bricks from a 26 foot level; or providing other suitable means of preventing employee exposure to falling bricks.	10-8-73

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 15 working days, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

"No person shall discriminate in any manner against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "Working day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

The proposed penalty for Nonserious Violations of safety and health standards reflects a 50 percent adjustment factor for corrective action to be taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, the 50 percent adjustment will be added to such other penalty as may subsequently be proposed for failure to correct a violation within the abatement period. No abatement credit is allowed for violations of recordkeeping or posting requirements.

REC'D-SYRACUSE AREA

1973 SEP 24 AM 10:30

OSHA DEPT. OF LABOR

MARQUETTE CEMENT
manufacturing company

20 NORTH WACKER DRIVE • CHICAGO 60606



EXECUTIVE OFFICES
(312) 782-7000

September 20, 1973

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Chester C. Whiteside
Area Director
U. S. Department of Labor
Occupational Safety & Health Admin.
203 Midtown Plaza
700 East Water Street
Syracuse, New York 13210

Dear Mr. Whiteside:

We have received the notification of the proposed citation and penalty for the alleged violation of the Occupational Safety and Health Act at our Catskill Plant.

We do not feel that we are guilty of the alleged violation, and therefore are contesting the proposed citation and penalty. Our grounds are that the working conditions in the area of the affected employee complied with federal safety standards.

Sincerely,

Glenn K. Christensen
Director - Employee &
Community Relations

GKC/lrc

cc: Mr. George Koehlenhof
McDermott, Will & Emery
Mr. J. E. Gaffney
Mr. P. W. Gutmann
Mr. L. E. Rowlett
Catskill Plant

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BERNARD, SECRETARY OF LABOR, :
UNITED STATES DEPARTMENT OF LABOR

V. :

OSHR DOCKET

MARQUETTE CEMENT MANUFACTURING COMPANY

NO. 4725

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50

Authorized
Employee
Representative

COMPLAINT

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651, et seq.), hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Part 1920) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

II

The respondent, MARGUERITE CEMENT MANUFACTURING COMPANY, a corporation operating under the laws of the State of New York and doing business in the State of New York maintaining an office and place of business at Route 9W, Catskill, New York and with a principal office and place of business at 20 North Wacker Drive, Chicago, Illinois is and at all times hereinafter mentioned was engaged in the manufacture of cement.

III

Many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act.

IV

As a result of an inspection by an authorized representative of the plaintiff, respondent corporation was issued a citation for a violation on September 14, 1973 pursuant to section 9(a) of the Act.

V

On August 29, 1973, respondent violated section 5(a)(2) of the Act and the Occupational Safety and Health Standard found at 29 C.F.R. 1926.852(a) promulgated pursuant to section 6 of the Act at its workplace located at Route 9W, Catskill, New York in that respondent failed to insure that no material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected. While respondent was engaged in the demolition and reconstruction of a brick kiln in the kiln building it subjected its employees working near the passageway between the kiln building and the crane storage building to the hazards created by falling bricks. On August 29, 1973, employee Frank F. Rysavy was fatally injured by debris, including brick removed from the kiln, dumped out of an unprotected chute from the interior of the building.

In accordance with section 9(a) of the Act the citation provided that the above violation was to be abated by October 8, 1973. Such period was a reasonable period for the abatement of this violation.

VI

Item 1 of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 C.F.R. 1926.852(a) in place of the serious violation of section 5(a)(1) of the Act. The reason for the amendment is that investigation has disclosed that respondent was engaged in the demolition and reconstruction of a brick kiln and therefore the safety and health regulations for construction

found at 29 C.F.R. Part 1926 properly apply to this alleged violation.

VII

The violation alleged in the citation as set forth in paragraph V above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent, knew, or could with the exercise of reasonable diligence have known, of the presence of the violations.

VIII

On September 14, 1973 a notification of proposed penalty for the citation was served on the respondent corporation, proposing a penalty of \$600. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

IX

On September 24, 1973 the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citation and the proposed assessment of the penalty pursuant to the provisions of section 10(c) of the Act. This notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

X

Several of respondent's employees are affected by the violation reflected in paragraph V herein. The authorized employee representative of the affected employees is The United Cement, Lime and Gypsum Workers Union, Local Number 50, an unincorporated association maintaining a mailing address at 340 Main Street, Catskill, New York. At all times relevant the said local union was certified as the collective bargaining representative of the affected employees of the respondent corporation and at all times relevant herein it has had collective bargaining agreements with the respondent corporation.

WHEREFORE, the aforesaid citation and proposed
penalty should be affirmed.

/s/ William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

/s/ Francis V. LaRuffa
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Theodore T. Gotsch
THEODORE T. GOTSCH
Attorney

UNITED STATES DEPARTMENT OF
LABOR, ATTORNEYS FOR
PETER J. BRENNAN, SECRETARY
OF LABOR.

Notice to the MARQUETTE CENTRE MANUFACTURING COMPANY

You are hereby notified that you must plead or otherwise answer this complaint, either denying or admitting the allegations, within 15 days of your receipt of this complaint. Failure to do so may result in dismissal of your notice of contest. See, Rule 33(1), Rules of Procedure, Occupational Safety and Health Review Commission.

CERTIFICATE OF SERVICE

I, CHRISTINE FERRARA, an employee of the United States Department of Labor in the Office of the Regional Solicitor, 1515 Broadway, New York, New York, certify that on the 15 day of October, 1973 I mailed postpaid by first class mail, bearing Government frank four (4) copies of the attached

COMPLAINT

two copies being addressed to Marquette Cement Manufacturing Company and one copy to United Cement, Lime and Gypsum Workers, Local 50 and one to Marquette Cement Manufacturing Company, Catskill, New York at the addresses stated after their names:

Marquette Cement Manufacturing Co.
20 North Wacker Drive
Chicago, Illinois 60606

United Cement, Lime and
Gypsum Workers, Local 50
349 Main Street
Catskill, New York

Marquette Cement Manufacturing
Route 9W
Catskill, New York

/s/ Christine Ferrara
CHRISTINE FERRARA

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, :
UNITED STATES DEPARTMENT OF LABOR

V.

: OSHRC DOCKET

MARQUETTE CEMENT MANUFACTURING
COMPANY

NO. 4725

Respondent

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50

Authorized
Employee
Representative

ANSWER

GEORGE W. MOEHLLENHOF

DOUGLAS A. CAIRNS

Attorneys for Marquette Cement
Manufacturing Company

POST OFFICE ADDRESS:

George W. Mochlenhof
Attorney
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, :
UNITED STATES DEPARTMENT OF LABOR

V.

: OSHRC DOCKET

MARQUETTE CEMENT MANUFACTURING
COMPANY

NO. 4725

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50

Authorized
Employee
Representative

ANSWER

Comes now the respondent, MARQUETTE CEMENT MANUFACTURING COMPANY, by its attorney, George W. Moehlenhof, denying that it has violated the Occupational Safety and Health Act of 1970 as alleged, states as follows:

1. Admits the allegations contained in paragraph I of said complaint.
2. Admits the allegations contained in paragraph II of said complaint.
3. Admits the allegations contained in paragraph III of said complaint.
4. Admits that the respondent was issued a citation for an

alleged violation on September 14, 1973 by an authorized representative of the plaintiff but denies that the citation was properly issued pursuant to section 9(a) of the Act.

5. Respondent denies the allegations contained in paragraph V of said complaint.

6. Respondent admits that Item 1 of the citation was amended by paragraph V of said complaint to allege a serious violation of 29 C. F. R. 1926.852(a) in place of the alleged serious violation of section 5(a)(1). The respondent denies the applicability of the standard reflected in 29 C. F. R. 1926.853(a) and denies plaintiff's right to so amend.

7. Denies the allegations contained in paragraph VII of said complaint.

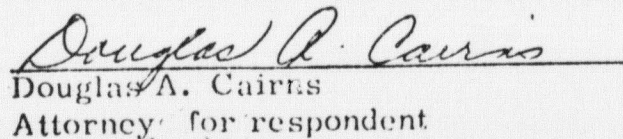
8. Admits the service of the notification of the proposed penalty of \$600.00 by the plaintiff upon the respondent, but denies the remaining allegations contained in paragraph VIII.

9. Admits the allegations contained in paragraph IX of said complaint.

10. Admits on information and belief, the representative status of Local 50, United Cement, Lime and Gypsum Workers Union but denies the remaining allegations contained in paragraph X.

WHEREFORE, respondent prays that the citation and proposed penalty be vacated.


George W. Moehlenhof


Douglas A. Cairns
Attorney for respondent

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY
OF LABOR, UNITED STATES DEPART-
MENT OF LABOR

v.

MARQUETTE CEMENT MANUFACTURING
COMPANY

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50,

Authorized
Employee
Representative.

OSHRC DOCKET

No. 4725

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Complainant and Respondent acting through their respective attorneys that at all times mentioned herein, the following facts are true and may be accepted as true without further proof for the purposes of trial and hearing on the Complaint and Answer thereto, in the above mentioned matter, and that this Stipulation may be admitted in evidence.

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

2. The Respondent, Marquette Cement Manufacturing Company, is a corporation organized under the laws of the State of Delaware, conducts business in the State of New York, maintains an office and place of business at Route 9W, Catskill, New York and maintains a principal office and place of business at 2200 First American Center, Nashville, Tennessee. At all times hereinafter mentioned, Respondent was engaged principally in the manufacture of cement.

3. At all times hereinafter mentioned, the Respondent used materials and supplies manufactured outside the State of New York and is engaged in a business affecting commerce within the meaning of Sections 3(3) and 3(5) of the Act.

4. On August 29, 1973, the Respondent was engaged in the demolition and reconstruction of a kiln in the Kiln Building at its plant located at Route 9W, Catskill, New York.

5. Respondent utilizes the kiln in the cement manufacturing process to dry the material and form the compounds which are the elements of cement, by means of heating the kiln up to 2800 degrees Fahrenheit.

The raw material is brought into the kiln by a conveyor system. The kiln rotates and the material is transferred through the kiln by gravity. As the material is dumped through the kiln the brick lining of the kiln is worn away. When the brick lining is worn to slightly less than one-half its original width, those bricks which are worn must be removed and that portion of the kiln must be relined with new bricks. At least partial relining is necessary a minimum of four times annually, and requires a period of five days to complete on the average. It is the position of the Respondent that the above described relining process does not constitute construction within the meaning of the Regulations and the contrary position is taken by Complainant.

6. Respondent disposes of debris resulting from the demolition of the kiln brick by dropping the material outside the exterior wall into the alleyway between the Kiln Building and the Crane Storage Building by means of an unprotected chute approximately 26 feet above the ground.

7. Respondent did not provide any protection to employees working near the alleyway between the Kiln Building and the Crane Storage Building from hazards created by falling bricks. Protective devices such as danger signs, barricades or an enclosed chute were not provided as a means of preventing employee exposure to falling bricks.

8. At approximately 8:45 p.m. on August 29, 1973 Respondent's employee, Frank F. Rysavy while in the alleyway separating the Kiln Building and the Crane Storage Building, was struck by a large quantity of debris being dumped out of the chute from the interior of the Kiln Building. Mr. Rysavy was killed immediately as a result of a crushed skull caused by the falling bricks.

9. The condition of said chute described above was known to Respondent's representatives.

10. The Secretary of Labor as a result of an investigation of the accident involving Mr. Rysavy thus issued a citation which was amended by the Complaint to allege a serious violation of Occupational Safety and Health Standard 29 C.F.R. 1926.852(a). This Standard provides "Chutes. (a) No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected."

11. Mr. Rysavy was hired April 22, 1946 and, accordingly, was an employee of 27 years experience at the time of his fatal accident. At the time he was assigned to perform maintenance work inside the Kiln Building and no witnesses are available to testify to any circumstances which explain his presence outside the Kiln Building.

12. Respondent was properly served with the citation, notification of proposed penalty and Complaint in accordance with the provisions of the Act.

Wherefore, based upon the above Stipulation of Facts the parties hereto certify that only the following two questions remain to be decided in this proceeding:

1. Was Respondent properly cited for a serious violation of 29 C.F.R. 1926.852(a)?

2. If Respondent was properly cited, should the proposed penalty of \$600 be affirmed?

Furthermore, the parties consent to a determination of the
above questions by the Court based upon the above Stipulation.

DATED: March 13, 1974

Department of Labor

William J. Kilberg

William J. Kilberg
Solicitor of Labor

Francis V. LaRuffa

Francis V. LaRuffa
Regional Solicitor

Theodore T. Gotsch

Theodore T. Gotsch
Attorney

Attorneys for Secretary of Labor

George W. Moehlenhof

George W. Moehlenhof
McDermott, Will & Emery
Attorney for Respondent

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
1515 BROADWAY
NEW YORK, NEW YORK 10036

Tel: 212-971-7574



April 5, 1974

Honorable William E. Brennan
Occupational Safety and Health
Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

Dear Judge Brennan:

Re: Marquette Cement Manufacturing Co.
OSHRC Docket No. 4725

Enclosed please find the Secretary's proposed exhibit A, a Penalty Assessment Worksheet-Serious Violations (Form OSHA-11). The attorney for the respondent was previously served with a copy of this exhibit and he has no objection to its admission together with the explanation of the proposed penalty which was inadvertently omitted from the stipulated facts previously submitted. Therefore please permit the addition of the following stipulated fact to those previously submitted to the Court.

13. The Secretary of Labor issued a proposed penalty of \$600. for the alleged serious violation. A \$1,000 unadjusted penalty for a serious violation was reduced by 20% credit for respondent's good faith based upon an evaluation that the respondent's safety and health program was generally effective. A further credit of 20% was allowed because of respondent's history of no previous Occupational Safety and Health citations. No credit was given to respondent for size since it employed approximately 150 employees at its Catskill, New York plant. No further credits were permitted by officials of the Occupational Safety and Health Administration in computing the final proposed penalty of \$600.

Sincerely,

Francis V. LaRuffa
Regional Solicitor

cc: George W. Moehlenhof, Esq.
United Cement, Lime 7 Gypsum Workers, Local 50

ADDRESS

PENALTY ASSESSMENT WORKSHEET - SERIOUS VIOLATIONS

SMO NO.	OSMA-1 NO.
51017	235
AREA	REGION
11	22

DATE CITATIONS-SENT

NO. 1 ON 9/14/73

(7) TOTAL \$ 605

DATE NOTICE OF PROPOSED PENALTY SENT

DATE EMPLOYER RECEIVED NOTICE

(12) TOTAL \$

DATE NOTICE OF PROPOSED
ADDITIONAL PENALTIES SENT

DATE EMPLOYER RECEIVED

PENALTIES REMITTED

DATE

PREPARED BY

DATE _____

REVIEWED BY

DATE _____

SEP 11 1973

PENALTIES REMITTED

DATE _____

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY
OF LABOR, UNITED STATES DEPART-
MENT OF LABOR

v.

MARQUETTE CEMENT MANUFACTURING
COMPANY,

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50,

Authorized
Employee
Representative.

OSHRC DOCKET
NO. 4725

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Having abandoned the "general duty" standard, the Secretary of Labor cannot now be allowed to return to that standard following a dismissal of the amended citation on the ground of inapplicability of the standard cited. To allow the Secretary of Labor to return to the originally cited grounds following dismissal of the amended citation is tantamount to allowing alteration of the basis of his charge after the evidence has been presented on the basis of the amended citation. In short, allowing the Secretary of Labor to return to the original ground would constitute deprivation of due process which the judge found to be proscribed by the Act in Reserve Roofing and Sheet Metal, Inc., OSHRC Docket No. 1796 (Judge C. K. Chaplin, 1973), CCH Employment Safety and Health, ¶16,353.

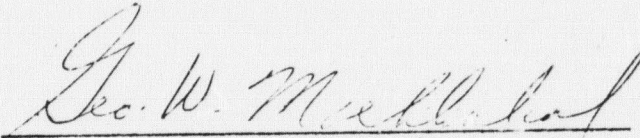
Assuming arguendo that the dismissal of the amended citation on the grounds of the inapplicability of 29 CFR 1926.852(a) operates to revive the original charge of a violation of the "general duty" standard, the Secretary of Labor has failed to meet his burden of proof establishing the "general duty" violation. To sustain a charge of a serious violation of the "general duty" standard, the Secretary must prove that the employer knew or should have known of the existence of the hazard. George Nelson Roberts, Jr., OSHRC Docket No. 98 (Judge D. G. Oringer, 1973), CCH Employment Safety and Health, ¶15,065. The Secretary of Labor offered no evidence whatsoever that the Respondent knew or should have known that the manner in which the removed brick was discarded

constituted a hazard to its employees. To the contrary, the evidence reveals that there is no explainable reason for the presence of Mr. Rysavy in the area in question. Similarly, the record is devoid of any evidence whatsoever that any employee has cause to be in the area. In short, there is no evidence whatsoever that the Respondent should have recognized the activity in question as hazardous to its employees.

CONCLUSION

For the reasons stated, and upon the record as a whole, the Respondent respectfully requests that the citation and proposed penalty be vacated.

Respectfully submitted,


George W. Mochlenhof, Attorney
for Respondent, Marquette Cement
Manufacturing Company

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60605
(312) 372-2000

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRIDGMAN, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF LABOR :

v. :

OSHRDC Docket

MARQUETTE CEMENT MANUFACTURING CO. :

NO. 4725

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50 :

Authorized
Employee
Representative. :

SECRETARY OF LABOR'S
MEMORANDUM OF LAW

STATEMENT OF THE CASE

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (hereinafter referred to as "the Act") to review a citation issued by the Secretary of Labor pursuant to section 9(a) and a proposed assessment of penalty thereon issued pursuant to section 10(a) of the Act.

The citation issued on September 14, 1973 alleges that Marquette Cement Manufacturing Company, the employer (hereinafter referred to as the "respondent") violated section 5(a)(1) of the Occupational Safety and Health Act in that "the employer failed to furnish each of his employees working near the passageway between the Kiln Building and the Crane Storage Building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as;

respondent, the gravity of the violation, the good faith of the employer and the history of previous violations in proposing a penalty of \$600 as required under section 17(j) of the Act.

III THE SECRETARY SHOULD BE PERMITTED TO AMEND HIS PLEADINGS TO CONFORM TO THE EVIDENCE PURSUANT TO F.R.C.P. RULE 15

Pursuant to Commission rule 33(a) (3) the Secretary moved at the time he served his complaint to amend the allegation of a section 5(a) (1) violation to an allegation of a violation of a specific standard, 29 C.F.R. 1926.652(a). Assuming arguendo that 29 C.F.R. 1926.652(a) is found inapplicable to the facts of the instant citation, the Secretary should be permitted to amend his pleadings, pursuant to F.R.C.P. 15(b) to conform them to the proof. Indisputably the facts stipulated in this case make out a cause of action under the Act's so called "general duty clause". The various Occupational Safety and Health Standards cited above make it clear that the respondent failed to furnish to each of his employees employment and a place of employment which are causing or are likely to cause death or serious physical harm to his employee. Use of an unprotected chute is certainly a recognized hazard as shown by the industry experience crystallized into 29 C.F.R. 1926.252(a) and 29 C.F.R. 1926.652(a).

The Review Commission in Brisk Waterproofing Co., Inc. OSHRC Docket No. 1046, allowed the Secretary to amend the violation from a section 5(a) (1) to a violation of a standard after the Judge filed his decision. The Commission relied on rule 15 of the Federal Rules of Civil Procedure and stated:

This rule was intended to promote decisions on the merits of issues and not upon the pleadings.

After the Review Commission adopted a liberal view toward pleading in the Trisk Waterproofing case, Judge Chaplin held as a conclusion of law in General Electric Co., OSHRC Docket No. 2739.

The citation may be amended at any stage of the proceeding prior to the decision if the respondent is afforded due process.

In the General Electric case the Secretary moved to amend, in one instance to a more applicable standard, and in another he moved to amend from a standard to section 3(a)(1) at the hearing. The Judge allowed the amendments with the following reasoning:

The purpose of the Act cannot be served by permitting the actions of the Secretary's agents to defeat the achievements of safe and healthful working conditions. So long as the respondent is on notice of the charge, permitted adequate time to cure surprise and prepare its defense and the amendment flows from the same factual situation the Judge may grant a motion to amend at any stage of the proceeding or on his own initiative amend to conform to the evidence pursuant to Rule 15 of the Federal Rules of Civil Procedure within the limitations previously expressed. (p. 46 of the decision).

In National Realty and Construction Co., 489 F. 2d 1257 (1973), the Court of Appeals, Second Circuit

stated:

This follows from the familiar rule that administrative pleadings are very liberally construed 29/ and very easily amended 30/. The rule has particular pertinence here, for citations under the 1973 Act are drafted by non-legal personnel, acting with necessary dispatch. Enforcement of the Act would be crippled if the Secretary was inflexibly held to a narrow construction of citations issued by his inspectors. 31/

29/ Professor Davis states the rule with characteristic verve. The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. * * *

1 K Davis, Administrative Law Treatise §2.04 at 523 (1958). See also Washof v. FCC, 142 U.S. App. D.C. 274, 437 F. 2d 707 (1970).

30/ HLRB v. Fant Willing Co., 360 U.S. 201 (1959).
HLRB v. Pallette Stone Corp., 2 Cir., 283 F. 2d 641 (1960).

31/ Allowing subsequent amendment of a citation's charges will not disturb the central function of the citation, which is to alert a cited employer that it must contest the Secretary's allegation or pay the proposed fine. In the typical case, the more inaccurate or unskillfully drafted is a citation, the more likely an employer will be to contest it. But a citation also serves to order an employer to correct the cited condition or practice, and a failure to so correct is a punishable violation. 29 U.S.C. §666(d). Obviously an employer cannot be penalized for failing to correct a condition which the citation did not fairly characterize. Thus, before penalizing a failure to correct a cited violation, the Commission must satisfy itself that the citation defines the uncorrected violation with particularity. 29 U.S.C. §658 (a).

In Sun Shipbuilding and Dry Dock Company, OSHRC Docket No. 161, the Secretary cited respondent under both section 5(a)(1), the so-called general duty requirement and section 5(a)(2) for failure to comply with a more specific occupational safety and health standard. The Judge and Commission found the specific standard to be applicable and vacated the 5(a)(1) citation. However as Commissioner Cleary noted in his concurring opinion, the Secretary should not only be permitted, but should be encouraged to cite and plead in the alternative." . . . This is in accord with Rule 8(e)(2) of the Federal Rules of Civil Procedure . . . Pleading in the alternative has a long tradition in the law."

" Under this procedure, employers are assured of promptly issued specific citations. At the same time, dismissals based on deficient citations which frustrate the avowed purpose of the Act can be reduced or eliminated". See also Judge Harris' recent decisions in Elin Construction Co., OSHRC Docket No. 3486 and Old Forge Construction Co., OSHRC Docket No. 3491 which permitted liberal amendment of the pleadings.

CONCLUSION

Based upon the foregoing the Secretary's complaint
should be affirmed in all respects.

Respectfully submitted,

/s/ William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

/s/ Francis V. LaRuffa
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Theodore T. Gotsch
THEODORE T. GOTSCH
Attorney

U. S. Department of Labor
Attorneys for PETER J. BRENNAN
SECRETARY OF LABOR

CERTIFICATE OF SERVICE

I, CHRISTINE FERRARA, an employee of the United States Department of Labor in the Office of the Regional Solicitor, 1515 Broadway, New York, New York certify that on the 8 day of April, 1974 I mailed postpaid by first class mail bearing Government frank two (2) copies of the attached

Secretary's of Labor Memorandum of Law

to George W. Moehlenhof, Esq. and one to United Cement, Lime and Gypsum Workers, Local 50 at the addresses stated after their names:

George W. Moehlenhof, Esq.
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603

United Cement, Lime & Gypsum
Workers, Local 50
c/o Robert Wynne, President
Route 1
Box 432A
Saugerties, New York 12477

/s/ Christine Ferrara

CHRISTINE FERRARA

Heather Davis
OSMRC EXECUTIVE SECRETARY

JUDGE'S DECISION REC'D SEP 24 1974

UNITED STATES OF AMERICA ORDER ON

OCT 24 1974

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR :

Complainant :

v. :

DECISION AND ORDER

MARQUETTE CEMENT MANUFACTURING CO. :

Docket No. 4725
1

Respondent :

APPEARANCES:

FOR THE SECRETARY OF LABOR

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FOR THE RESPONDENT

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FOR THE EMPLOYEES

United Cement, Lime and Gypsum
Workers, Local 50
Robert Wynne, President
Route 1
Box 432A
Saugerties, New York 12477

Brennan, W.E.; A.L.J.

This is an action arising under the provisions of Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c), (hereinafter the Act), to review a Citation for Serious Violation and Notification of Proposed Penalty issued pursuant to Sections 9(a) and 10(a) of the Act (29 U.S.C. 658(a) and 659(a)) on September 14, 1973, by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration for Syracuse, New York, (hereinafter Complainant) to Marquette Cement Manufacturing Company of Catskill, New York, (hereinafter Respondent).

This case arose from a fatal accident to one of Respondent's employees which occurred on August 29, 1973 at the Respondent's cement manufacturing plant located on Route 9W, Catskill, New York (hereinafter worksite).

Following an inspection by Complainant's representative, a Citation for Serious Violation of Section 5(a)(1) of the Act (29 U.S.C. 654(a)(1)) was issued to Respondent on September 14, 1973, which set forth the following "Description of alleged violation":

"The employer failed to furnish to each of his employees working near the passageway between the Kiln Building and the Crane Storage Building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as; providing danger

signs to alert employees that an immediate hazard exists from falling bricks; providing barricades to deter and prevent employees from entering the brick dumping area; providing an enclosed chute for the dumping of bricks from a 26 foot level; or providing other suitable means of preventing employee exposure to falling bricks."

A penalty of \$600.00 was proposed based upon this alleged Serious Violation.

By its letter dated September 20, 1973, Respondent noted its contest to this Citation and proposed penalty.

Pursuant to Section 10(c) of the Act, (29 U.S.C. 659(c)), this case was forwarded to the Review Commission.

On October 17, 1973 the Complaint herein was filed with the Commission, which amended the Citation to charge a violation of Section 5(a)(2) of the Act (29 U.S.C. 654(a)(2)) by failure to comply with the Occupational Safety and Health Standard set forth at 29 CFR 1926.852(a).

Paragraphs V and VI of the Complaint set forth the following:

V

"On August 29, 1973, respondent violated section 5(a)(2) of the Act and the Occupational Safety and Health Standard found at 29 C.F.R. 1926.852(a) promulgated pursuant to section 6 of the Act at its workplace located at Route 9W, Catskill, New York in that respondent failed to insure that no material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected. While respondent was engaged in the demolition and reconstruction of a brick kiln in the kiln building it subjected its employees working near the passageway between the kiln building and the crane storage building to the hazards created by falling bricks. On August 29, 1973, employee Frank F. Rysavy was fatally injured

by debris, including brick removed from the kiln, dumped out of an unprotected chute from the interior of the building.

"In accordance with section 9(a) of the Act the citation provided that the above violation was to be abated by October 8, 1973. Such period was a reasonable period for the abatement of this violation.

VI

"Item 1 of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 C.F.R. 1926.852(a) in place of the serious violation of section 5(a)(1) of the Act. The reason for the amendment is that investigation has disclosed that respondent was engaged in the demolition and reconstruction of a brick kiln and therefore the safety and health regulations for construction found at 29 C.F.R. Part 1926 properly apply to this alleged violation."

Respondent, through its counsel, filed its Answer to this Complaint with the Commission on November 5, 1973, in which it admitted the jurisdictional allegations of the Complaint, but denied the substantive allegations of the alleged violation including a denial of the applicability of the cited Standard to the conditions alleged to be violative of the Act.

After assignment of this case to the undersigned the trial date of February 26, 1974, was vacated upon notice from the parties that the case was to be submitted upon stipulated facts and briefs.

The Stipulation of Facts and Briefs from both counsel were filed by April 10, 1974.

In the last paragraph of this Stipulation, the parties consented to a determination of two questions based upon the stipulated facts. These two questions were set out as follows in the Stipulation:

- "1. Was Respondent properly cited for a serious violation of 29 C.F.R. 1926.852(a)?
2. If Respondent was properly cited, should the proposed penalty of \$600.00 be affirmed?"

In order to determine these, and additional questions raised in this case, the following stipulated facts are material.

All jurisdictional facts are established in paragraphs numbered 1, 2, and 3 of the Stipulation of Facts.

The Stipulation further provides:

*

*

*

"2. At all times herein mentioned, Respondent was engaged principally in the manufacture of cement.

*

*

*

"4. On August 29, 1973, the Respondent was engaged in the demolition and reconstruction of a kiln in the Kiln Building at its plant located at Route 9W, Catskill, New York.

"5. Respondent utilizes the kiln in the cement manufacturing process to dry the material and form the compounds which are the elements of cement, by means of heating the kiln up to 2800 degrees Fahrenheit. The raw material is brought into the kiln by a conveyor system. The kiln rotates and the material is transferred through the kiln by gravity. As the material is dumped through the kiln the brick lining of the kiln is worn away. When the brick lining is worn to slightly less than one-half its original width, those bricks which are worn must be removed and that portion of the kiln must be relined with new bricks. At least partial relining is necessary a minimum of four times annually, and requires a period of five days to complete on the average. It is the position of the Respondent that the above described relining process does not constitute construction within the meaning of the Regulations and the contrary position is taken by Complainant.

"6. Respondent disposes of debris resulting from the demolition of the kiln brick by dropping the material outside the exterior wall into the alleyway between the Kiln Building and the Crane Storage Building by means of an unprotected chute approximately 26 feet above the ground.

"7. Respondent did not provide any protection to employees working near the alleyway between the Kiln Building and the Crane Storage Building from hazards created by falling bricks. Protective devices such as danger signs, barricades or an enclosed chute were not provided as a means of preventing employee exposure to falling bricks.

"8. At approximately 8:45 p.m. on August 29, 1973, Respondent's employee, Frank F. Rysavy, while in the alleyway separating the Kiln Building and the Crane Storage Building, was struck by a large quantity of debris being dumped out of the chute from the interior of the Kiln Building. Mr. Rysavy was killed immediately as a result of a crushed skull caused by the falling bricks.

"9. The condition of said chute described above was known to Respondent's representatives.

"10. The Secretary of Labor as a result of an investigation of the accident involving Mr. Rysavy thus issued a citation which was amended by the Complaint to allege a serious violation of Occupational Safety and Health Standard 29 C.F.R. 1926.852(a). This Standard provides 'Chutes. (a) No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected.'

"11. Mr. Rysavy was hired April 22, 1946 and, accordingly, was an employee of 27 years experience at the time of his fatal accident. At the time he was assigned to perform maintenance work inside the Kiln Building and no witnesses are available to testify to any circumstance which explain his presence outside the Kiln Building."

The first question presented by this record is whether the Standard cited in the Complaint is allegedly violated, 29 CFR 1926.852, is applicable to Respondent's activities being carried on at its worksite on the day of the accident, August 29, 1973.

The Complainant's Regulations set forth at 29 CFR 1910.12, entitled "Construction Work" provide as follows:

"(a) Standards.

The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

(b) Definition.

For purposes of this section, 'construction work' means work for construction, alteration, and/or repair, including painting and decorating. See discussion of these terms in §1926.13 of this title." (Emphasis added)

The Regulation cited under paragraph (b) supra, and the laws therein cited, contain substantially the same language as above quoted. Thus, the question is raised - What is "construction work"?

Webster's Third New International Dictionary, (Unabridged, 1971) defines "construct" to mean:

"to form, make, or create by combining parts;
build, fabricate."

"construction" is defined as:
"the act of putting parts together to form a complete integrated object; fabrication".

Thus "construction work" means the expenditure of effort to form, make or create a complete object, such as a building, bridge, highway, etc. That is, to build or fabricate an object by combining parts. Consequently, all work expended in initially fabricating a building (the complete integrated object), or in altering, repairing, painting or decorating the building, qualifies as "construction work" under the cited definition.

However, work performed not on the building of an integral part thereof, such as upon machinery within the building, can not be considered as "construction work" as defined in the Complainant's Regulations.

As to the case at bar, there is no evidence that the kiln being relined with new brick, was an integral part of the building within which it was located, i.e., the "Kiln Building". Rather, the evidence of record most strongly supports the conclusion that the kiln was a piece of manufacturing equipment, used exclusively by Respondent in its business of manufacturing cement.

Therefore, the periodic repair of this kiln, made necessary by Respondent's manufacturing processes, involved the repair of manufacturing equipment, not the type of "repair" intended in the definition of "construction work" set forth supra. To conclude otherwise would lead to absurd results, i.e., the repair of drill presses in a manufacturing building could be construed to be "construction work". It is therefore concluded that Respondent's activity of relining a kiln on the day in question, was not "construction work" as contemplated by the Complainant's "Construction Standards"^{1/} and consequently these activities were not within the purview of these Standards.

Assuming arguendo and for purposes of a complete determination of this case, that Respondent's activities on the day in question could be

^{1/} A similar result has been reached by Judge Chalk in a strikingly similar case, Sec. of Labor v. Keibler Industries, Inc., Docket No. 1689, 6/28/73. This decision has become the final order of the Commission pursuant to Section 12(j) of the Act, (29 USC 661(j)) as no review was directed.

construed to be within the scope of the Complainant's "Construction Standards", the specific Construction Standard relied upon, 29 C.F.R. 1926.852(a), does not apply to Respondent's activity.

This Standard is found in Subpart T of Complainant's Standards, which is labeled "Demolition".

Again, Webster's Unabridged Dictionary, cited supra, defines the word "demolition" as:

"the act or process of demolishing."

The word "demolish" is defined as
"...to pull or tear down (as a building)
...to raze; to break to pieces or apart usually
with force or violence; ruin completely; shatter,
smash..."

The obvious activities intended to be covered by the Standards in Subpart T, are those involving the demolition of structures, that is the razing or tearing down of structures. This coverage is clearly evident from a reading of these standards in this Subpart (29 CFR 1926.850 - 1926.860).

The activity of Respondent, in relining a kiln cannot reasonably be labeled the "demolition" of the kiln. It is clear from the Stipulation of Facts, that the kiln involved was not demolished, or torn down, rather its worn brick lining was removed preparatory to installing a new brick lining. This constituted the repair of the kiln, not its demolition.^{2/}

^{2/} Paragraph 4 of the Stipulation states "...the Respondent was engaged in the demolition and reconstruction of a kiln in the Kiln Building..." at the worksite. This conclusory statement, is not binding upon the Commission, when it is contradicted by other factual statements in the Stipulation, (see paragraph 5 thereof), is contrary to the generally recognized meaning of the term "demolition", and where

Having answered question number 1 as proposed by the parties in the negative, that is, Respondent was not properly cited for a serious violation of 29 CFR 1926.852(a), there remains another question raised in Complainant's Brief.

Part III of this Brief, in effect moves to amend the "...pleadings, pursuant to F.R.C.P. 15(b) to conform them to the proof", in the event it is found that the Standard relied upon in its Complaint is inapplicable.

By this motion, Complainant moves to amend the pleadings to once again charge a violation of Section 5(a)(1) of the Act, as initially charged in its Serious Citation herein, believing that the proofs establish such a violation.

The Respondent in its brief, addresses the question of whether the proofs establish a violation of Section 5(a)(1) of the Act. Thus, the legal issue, on this record, has been expressly tried. Further, the factual or evidenciary basis for a Section 5(a)(1) charge, has not changed, i.e., the Stipulation of Facts. Therefore, my understanding of Commission precedent, ^{3/} judicial precedent ^{4/}, and Rule 15 of the Federal Rules of Civil Procedure, leads me to conclude that the Complainant's Motion should be granted as I am unable to conclude on this record that the Respondent is prejudiced thereby.

^{3/} See: Sec. of Labor v. Brisk Waterproofing Co., Inc., Dkt. No. 1046, 7/27/73;
Sec. of Labor v. J. L. Mabry Grading, Inc.; Dkt. No. 285, 4/27/73;
Sec. of Labor v. Advance Air Conditioning, Inc.; Dkt. No. 1036, 4/4/74;
Sec. of Labor v. Copelan Plumbing Co.; Dkt. No. 867, 6/17/74;
Sec. of Labor v. Gerstner Electric, Inc.; Dkt. No. 997, 8/1/74.

^{4/} National Realty and Construction Co., Inc. v. OSHRC and Sec. of Labor

There consequently remains for determination, one last question, whether the evidence of record establishes a violation of Section 5(a)(1) of the Act.

This section of the Act provides:

"(a) Each employer -
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;" (29 U.S.C. 654(a)(1)).

In order to sustain a violation of this Section of the Act, the Complainant must establish, among other things, that Respondent's place of employment was not free from recognized hazards "...that are causing or are likely to cause death or serious physical harm to his (Respondent's) employees."

In order to sustain a "serious" violation of this Section, as charged herein, the Complainant must establish that the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the violation (Section 17(k), 29 U.S.C. 666(h)).

There is no evidence in this record that Respondent's method of discarding the used brick taken from the kiln under repair, was causing or was likely to cause death or serious physical harm to any employee engaged in employment activity. The Stipulation establishes that the employee accidentally killed on August 29, 1973, was an employee of 27 years experience with Respondent. Further, on this date, "...he was assigned to perform maintenance work

inside the Kiln Building and no witnesses are available to testify to any circumstances which explain his presence outside the Kiln Building." (Para. 11 Stipulation of Facts).

Paragraph 6 of this Stipulation describes the area between the Kiln Building and Crane Storage Building as an "alleyway".

In short, there is no evidence to support a conclusion that this area was used by Respondent's employees as a passageway, nor as an area within which any work was to be performed. The contrary inference is possible, although not necessary, by denominating the area an "alleyway". The record is similarly devoid of any evidence to establish any reason for any employee to be in this area.

It is therefore concluded that Complainant has not sustained the requisite burden of establishing that the condition existing at this worksite was causing or was likely to cause any employee serious physical harm,^{5/} or that Respondent knew or reasonably could have known that this condition could result in serious physical harm to any of its employees.

There is insufficient evidence in this record to support a violation of Section 5(a)(1) of the Act.

5/

The mere occurrence of an accident does not necessarily mean a hazard exists as defined in 29 U.S.C. 654(a)(1). Sec. of Labor v. Koppers Co., Inc., 1 OSAHRC 666 (1972).

- 13 -

Now, therefore, based upon the evidence of record and pursuant to the provisions of Sections 10(c) and 12(j) of the Act, (29 U.S.C. 659(c) and 661(j)), it is hereby,

ORDERED:

That the Citation for Serious Violation, as amended, and civil penalty proposed thereon are VACATED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: 24 SEP 1974
Washington, D.C.

UNITED STATES OF AMERICA
NATIONAL SAFETY AND HEALTH REVIEW COMMISSION

J. BRENNAN, SECRETARY OF LABOR, :
Complainant, :
v. : OSHRC
MARQUETTE CEMENT MANUFACTURING CO., : DOCKET NO. 4725
Respondent. :

PETITION FOR DISCRETIONARY REVIEW

Complainant, the Secretary of Labor, being aggrieved by the Decision and Order of the Administrative Law Judge in the above matter, hereby submits this Petition for Discretionary Review pursuant to Section 2200.91 of the Rules of Procedure of the Occupational Safety and Health Review Commission.

Statement of Portions of the Decision
And Order to Which Exception is Taken

1. Complainant takes exception to the conclusion of law at page 8 of the Decision and Order:

... It is therefore concluded that Respondent's activity of relining a kiln on the day in question was not "construction work" as contemplated by the Complainant's "construction standards" and consequently these activities were not within the purview of these standards. (29 CFR 1926 et seq.).

2. Complainant takes exception to the conclusion of law at page 12 of the Decision and Order:

There is insufficient evidence in this record to support a violation of Section 5(a)(1) of the Act.

Since the kiln was not "an integral part" of the
In short, the Judge's definition is primarily con-

cerning the structure on which work was performed.

We submit that the correct definition of "construction" focuses on the tools, materials, and methods utilized in carrying out the project in question. If the project in question requires tools, materials, and methods which are typically involved in "fabrication" of building work, the project should be characterized as "construction work" under Part 1926.^{2/}

Since the Secretary's interpretation of construction work takes cognizance of the fact that specific sections of Part 1926 are concerned with the hazards associated with particular work procedures rather than particular structures, we submit that it is more appropriate than the Judge's.

Accordingly, it is our position that in the instant case, respondent's relining of the kiln constituted "construction work", since the project involved tools, materials and methods (and associated hazards) which are characteristic of fabrication and building.

2. Even if the Commission were to conclude that 29 CFR 1926.252(a) does not apply to respondent, the Secretary contends he has met the burden of proving a violation of Section 5(a)(1)

^{2/} In defining "construction work" under 29 CFR 1910.12(b), the Judge in Secretary of Labor v. S. G. Loewendick and Sons, Inc., OSHRC Docket No. 6120, (September 17, 1974), focused on the "tools and equipment" used in the operation in question.

of the Act. Accordingly, complainant submits that the Judge erred in vacating the citation on the ground that there is insufficient evidence in the record to support a 5(a)(1) violation.

The record establishes that one of respondent's employees was killed by debris which had been generated by the rebuilding of a kiln on the second floor of respondent's Kiln Building and then had been dropped outside the exterior wall of the building 26 feet into an alleyway. The stipulated record establishes that:

Respondent did not provide any protection to employees working near the alleyway between the Kiln Building and the Crane Storage Building from hazards created by falling bricks. Protective devices such as danger signs, barricades or an enclosed chute were not provided as a means of preventing employee exposure to falling bricks. (para. 7, Stipulation of Facts)

Under Section 5(a)(1), the Secretary must prove: (1) that the hazard in question was a "recognized hazard"; (2) that the recognized hazard "was causing or likely to cause death or serious physical harm"; and (3) that the employer failed to render its workplace "free" of the recognized hazard. National Realty and Construction Co. v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (C.A.D.C. 1973) at p. 1265. Complainant submits that it has proven the above elements required by section 5(a)(1).

First, complainant contends that respondent's procedure for disposing of debris, i.e. by dumping materials out of a third-story opening into an unprotected alleyway without using an enclosed chute, constitutes a "recognized" hazard. The test of whether a particular condition constitutes a "recognized hazard" involves an objective determination which can be made independently of respondent's perception of the condition.^{3/}

Complainant submits that common sense dictates that respondent's procedure for dumping bricks out of the Kiln Building constituted a "recognized hazard." This conclusion is buttressed by the fact that 29 CFR 1926.252(a) and 29 CFR 1926.852 require that specified precautions be taken when materials are dropped on the outside of the exterior wall of a building.

3/ In National Realty and Construction Co., Inc., supra, the court stated:

An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the General Duty Clause:

A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it. (489 F.2d 1257 at 1265, Footnote 32)

Second, it is clear that the "recognized hazard" in the instant case "was existing or likely to cause death or serious physical harm." The potential for serious physical injury is indicated in the record by the death of respondent's employee.^{4/}

Third, the record establishes that respondent failed to render its workplace "free" of the recognized hazard. As noted earlier, the stipulated record shows that respondent did not take measures to protect employees such as using an enclosed chute for dropping discarded bricks, placing warning signs in appropriate places, or restricting employee access to the area into which the bricks were dropped.

^{4/} In National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Commission, supra, the court indicated that the burden to show that a hazard is likely to cause death or serious physical harm is satisfied if the record shows that an employee died as a result of the hazard. (489 F.2d 1257 at 1265, Footnote 33)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant

v.

MARQUETTE CEMENT MANUFACTURING CO.,

Respondent

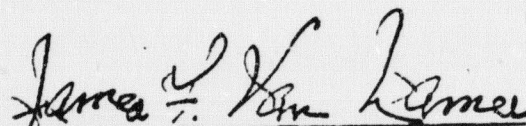
OSHR DOCKET NO. 4725

DIRECTION FOR REVIEW

Pursuant to the authority granted by the provisions of section 12(j) of the Occupational Safety and Health Act of 1970, the undersigned hereby directs review of the proposed decision and order in the above-captioned case.

Submissions are requested on but not limited to the following question:

1. Whether the trial Judge committed reversible error in concluding that Respondent was not in violation of section 5(a)(1) of the Act under the circumstances of this case.


JAMES F. VAN NAMEE
EXECUTIVE SECRETARY
COMMISSIONER

DATED: 10/27/74

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Voir

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY
OF LABOR, UNITED STATES DEPART-
MENT OF LABOR

v.

MARQUETTE CEMENT MANUFACTURING
COMPANY,

Respondent,

UNITED CEMENT, LIME AND GYPSUM
WORKERS, LOCAL NO. 50,

Authorized
Employee
Representative.

OSHRC DOCKET

NO. 4725

BRIEF FOR RESPONDENT
TO THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

above-cited cases, direct review on its own motion since it has not specified that procedure by way of its publication in the Federal Regulations. Accordingly, since the only review procedures specified in the then existing Review Commission rules requires receipt of a Petition for Discretionary Review no later than the 25th day following the Trial Judge's decision, and furthermore, since there was no compliance with that time limitation, the Review Commission is without authority to review the Trial Judge's decision.

II. THE TRIAL JUDGE ERRED IN GRANTING THE SECRETARY OF LABOR'S MOTION TO AMEND THE PLEADINGS TO RETURN TO THE PREVIOUSLY ABANDONED SECTION 5(a)(1) BASIS OF THE ALLEGED VIOLATION.

The original citation issued to the Respondent on September 14, 1973 alleged a violation of the general duty clause contained in Section 5(a)(1) of the Act. Subsequent to the Respondent's filing of a Notice of Contest, the Secretary filed a Complaint wherein he abandoned the general duty basis of the charge and substituted therefor an allegation of a violation of 29 C.F.R. 1926.852(a). The Complaint itself recited the abandonment of the 5(a)(1) basis. Paragraph VI of the Complaint stated:

"Item 1 of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 C.F.R. 1926.852(a) in place of the serious violation of Section 5(a)(1) of the Act." (Emphasis added.)

After the Respondent filed its Answer, the parties entered into a formal "Stipulation of Facts" dated March 13, 1974. That that Stipulation was entered into solely with respect to the alleged violation of 29 C. F. R. 1926.852(a) can be seen in the very wording of that Stipulation:

"Wherefore, based upon the above Stipulation of Facts the parties hereto certify that only the following two questions remain to be decided in this proceeding:

"1. Was Respondent properly cited for a serious violation of 29 C. F. R. 1926.852(a)?

"2. If Respondent was properly cited, should the proposed penalty of \$600 be affirmed?"

However, subsequent to the submission of the Stipulation of Facts to the Trial Judge, the Secretary of Labor in effect requested in Part III of his brief to be allowed to amend the pleadings pursuant to F. R. C. P. 15(b) to conform them to the evidence in the event that it was determined that the standard relied upon in the Complaint was not properly applicable. In other words, by that motion, the Secretary of Labor sought to amend the pleadings to again charge a violation of Section 5(a)(1) of the Act. In allowing this amendment, the Trial Judge clearly erred.

As the Review Commission held in RPM Erectors, Inc., OSHRC Docket No. 1114, dated September 3, 1974, a motion to amend the pleadings to conform with the evidence is not proper where "the issue on which the amendment is based was not consensually tried ...

or where Respondent was otherwise prejudiced." In the instant case, the parties' Stipulation of Facts clearly evidences the fact that the sole basis of the alleged violation to be resolved by the Trial Judge was whether or not the Respondent had violated the cited standard. That Stipulation of Facts was not addressed at all to a general duty violation. Accordingly, under the Review Commission's decision in RPM Erectors, Inc., supra, the Trial Judge's granting of the Secretary's motion to amend under Rule 15 was improper.

III. THE TRIAL JUDGE PROPERLY CONCLUDED THAT THE SECRETARY OF LABOR HAD FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT VIOLATED SECTION 5(a)(1) OF THE ACT.

The record evidence clearly establishes that there was no explainable reason whatsoever for the presence of Mr. Rysavy in the nonworking area on August 29, 1973. Mr. Rysavy's assigned work duties required his presence inside the Building. Moreover, the record is completely devoid of any evidence establishing that the situs of the accident was ever visited by employees of the Respondent. In short, Mr. Rysavy's presence outside of the Kiln Building on the day in question could not be reasonably anticipated or foreseen by the Respondent and, accordingly, cannot, under the authority established in Norman R. Bratcher Company, OSHRC Docket No. 83, dated March 1, 1973, serve to form the basis of a violation of Section 5(a)(1).

The disposal of brick into a nonworking area which the record evidence does not disclose to have been visited by Respondent's employees cannot be deemed a "recognized hazard". The Secretary of Labor, in alleging that this disposal constituted a "recognized hazard", is apparently returning to his previous attempt to extend application of the "construction standards" to the Respondent's operations. For example, the Secretary of Labor, in proffering suggestions as to the precautionary measures which Respondent should have taken, recites such matters as enclosed chutes, warning signs, etc., which are measures provided for in the construction industry standards. Those standards have been properly determined to be inapplicable to the Respondent, a manufacturer of cement and related products. Obviously, the disposal of bricks at a construction site into employee working areas is totally distinct from the discarding of bricks by an employer not involved in construction into areas where the employee presence cannot be reasonably anticipated or foreseen. In other words, merely because the disposal of brick into working areas of a construction site without the use of chutes, etc., might constitute a "recognized hazard", it does not necessarily follow that Respondent's manner of brick disposal constituted a recognized hazard. Republic Creosoting Company, OSHRC Docket No. 22, dated February 9, 1974.

The fact that a fatality arose as a result of the Respondent's

disposal of the worn firebrick is not, as argued by the Secretary of Labor, sufficient proof that the Respondent's method of brick disposal was likely to cause serious bodily injury or death. The Review Commission has held on more than one occasion that the mere fact of a fatality does not establish likelihood of serious injury. See, for example, the above-cited decision in Bratcher Company, supra, and National Realty and Construction Company, Inc., OSHRC Docket No. 85, dated September 6, 1972. Moreover, the U.S. Court of Appeals for the District of Columbia decision in National Realty and Construction Company, Inc. v. OSAHRC, 489 F.2d 1257 (1973), does not, as contended by the Secretary of Labor, establish the principle that the "burden" to show that a hazard is likely to cause death or serious physical harm is satisfied if the record showed that an employee died as a result of the hazard. In that decision the Court ruled that the actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation of the general duty clause even when that conduct has resulted in injury.

In short, the only evidence which allegedly supports a finding of a violation by Respondent of Section 5(a)(1) is the fact that an employee was fatally injured as a result of Respondent's brick disposal measures. As stated above, that fact alone is insufficient evidence of a violation. Since the Secretary of Labor must prove a violation of Section 5(a)(1) by a preponderance of the evidence (Biddeford and Saco Water

Company), OSHRC Docket No. 3347, dated March 21, 1974, he has not, in the instant case, met the burden of proof. Accordingly, the Trial Judge properly determined that the Respondent had not violated Section 5(a)(1).

CONCLUSION

For the reasons stated and upon the record as a whole, Respondent respectfully requests that the Review Commission not reverse the Trial Judge's vacating of the Secretary of Labor's citation and proposed penalty.

Respectfully submitted,

George W. Moehlenhof

Douglas A. Cairns

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, :
Complainant, :
v. : OSHRC
MARQUETTE CEMENT MANUFACTURING CO., : DOCKET NO. 4725
Respondent. :

BRIEF OF THE SECRETARY

QUESTION PRESENTED

On October 24, 1974, Commissioner Van Namee directed review in this case on the question of "whether the trial Judge committed reversible error in concluding that respondent was not in violation of Section 5(a)(1) of the Act under the circumstances of this case."

STATEMENT OF FACTS

This case arose from a fatal accident on August 29, 1973 to an employee working at respondent's cement manufacturing plant located in Catskill, New York. The stipulated facts establish that respondent's employee was killed when he was struck by debris which had been dropped outside the exterior wall of one of respondent's buildings 26 feet into an alleyway. The debris was dropped into the alleyway as a result of

ARGUMENT

THE JUDGE ERRED IN VACATING THE CITATION
ON THE GROUND THAT THERE IS INSUFFICIENT
EVIDENCE IN THE RECORD TO SUPPORT A 5(a)(1)
VIOLATION

Section 5(a)(1) of the Act provides:

- (a) Each employer
- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

In order to prove a violation of Section 5(a)(1), the Secretary must prove: (1) that the hazard in question was a "recognized hazard"; (2) that the recognized hazard "was causing or likely to cause death or serious physical harm"; and (3) that the employer failed to render its workplace "free" of the recognized hazard. National Realty and Construction Co. v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (C.A.D.C. 1973). Complainant submits that it has proven the above elements required by Section 5(a)(1).

The record shows that one of respondent's employees was killed by bricks and debris which had been dropped from the second floor of respondent's Kiln Building into an alleyway outside the exterior wall of the building. The stipulated record establishes that:

Respondent did not provide any protection to employees working near the alleyway between the Kiln Building and the Crane Storage Building from hazards created by falling bricks. Protective devices such as danger signs, barricades or an enclosed chute were not provided as a means of preventing employee exposure to falling bricks. (Para. 7, Stipulation of Facts)

First, complainant contends that the record establishes that respondent's procedure for disposing of kiln-repair debris, i.e. by dumping the materials out of a second-story opening into an unprotected alleyway without using an enclosed chute, constitutes a "recognized" hazard. The test of whether a particular condition constitutes a "recognized hazard" involves an objective determination which can be made independently of respondent's perception of the condition. In applying Section 5(a)(1), the court in National Realty and Construction Co., Inc., supra, stated:

An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the General Duty Clause:

"A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it.
(489 F.2d 1257 at 1265, Footnote 32)

(emphasis added)

In Secretary of Labor v. Consolidated Engineering Company, Inc. and Otis Elevator Company, OSHRC Docket Nos. 394 & 471 (October 17, 1974), the Commission made clear that for purposes of Section 5(a)(1), a "recognized" hazard can be a danger which would be identified by "the public in general".

...A condition may be recognized as such a hazard only when the evidence shows that it is commonly known by the public in general or in the cited employer's industry as a hazard of such type. (emphasis added) (Slip Opinion at p. 4)

In the instant case, complainant submits that respondent's procedure for dumping bricks out of the Kiln Building is "commonly known by the public in general" to be hazardous, i.e. common sense dictates that throwing heavy materials out of a second-story opening must be considered to be dangerous.^{3/} Under the court's ruling in National Realty and Construction Co., Inc., supra, it is irrelevant that respondent may have been "ignorant" of the "potential for harm" created by the dumping procedure.

Second, it is clear that the "recognized hazard" in the instant case "was causing or likely to cause death or serious physical harm". In National Realty and Construction Co., supra, the court indicated that the burden to show that a hazard is likely to cause death or serious physical harm is satisfied if the record shows that an employee died as a result of the hazard. (489 F.2d 1257 at 1265, Footnote 32) In the

^{3/} This conclusion is buttressed by the fact that 29 CFR 1926.252(a) and 29 CFR 1926.852 require that specified precautions be taken when materials are dropped on the outside of the exterior wall of a building. Additional support for the conclusion is to be found in the fact that the Judge did not consider the question of whether respondent's practice constituted a recognized hazard to be an issue in the case.

instant case, the death of respondent's employee obviously establishes the potential for serious physical injury involved in respondent's dumping operation.

The Judge's ruling that the Secretary failed to meet the above standard is clearly in error. The Judge's ruling is based on his interpretation of Section 5(a)(1) (read in conjunction with Section 17(k)), as requiring the Secretary to show that the employer knew that an accident involving the recognized hazard was likely to occur. Thus in his decision, the Judge stated:

In short, there is no evidence to support a conclusion that this area was used by Respondent's employees as a passageway, nor as an area within which any work was to be performed. The contrary inference is possible, although not necessary, by denominating the area an "alleyway". The record is similarly devoid of any evidence to establish any reason for an employee to be in this area.

It is therefore concluded that Complainant has not sustained the requisite burden of establishing that the condition existing at this worksite was causing or was likely to cause any employee serious physical harm, or that Respondent knew or reasonably could have known that this condition could result in serious physical harm to any of its employees. ^{4/}
(Judge's Decision at p. 12)

4/ Although the Judge does not clearly articulate such a position, it is conceivable that the Judge based his decision on an "isolated event" defense. The Judge appears to be saying that the citation must be vacated because the Secretary failed to show that the employee's presence in the alleyway was not an isolated event. Assuming that the Judge relied on an isolated event defense, his ruling is clearly erroneous. In Secretary of Labor v. Mississippi Valley Erection Company, OSHRC Docket No. 524 (December 26, 1973), the Commission made clear that the isolated event defense is a legal defense which must be affirmatively pleaded and proved by respondent.

(Continued)

In contrast, the language of Section 5(a)(1) and the court's ruling in National Realty and Construction Co., Inc., supra, clearly indicate that the Secretary need not show that an accident was likely to occur but need only show that if an accident involving a "recognized hazard" were to occur, death or serious physical injury would be the likely result. In Brennan v. Occupational Safety and Health Review Commission and Vy-Lactos Laboratories, Inc., 494 F.2d 460 (8th Cir., 1974), the court emphasized that employer may be guilty of a 5(a)(1) violation, even though a fatal accident which was caused by the "recognized hazard", involved factors which were not anticipated by the employer.

In addition, under Section 17(k) of the Act ^{5/} the Secretary is not required to show that the employer knew of the hazard

Cont.

4/ The Commission emphasized that unless if the defense is pleaded, the Secretary is not under a burden to show that employee exposure to a hazard was not an isolated event or that such exposure was the result of a pattern or established practice. In short, the Secretary need only show that an employee was exposed to a hazard and then the burden shifts to respondent to show that this exposure was an isolated event. In the instant case, Complainant met its burden by showing that an employee was in the alleyway and was exposed to the hazard. Respondent failed to raise an isolated event defense and failed to introduce any evidence to show that no other employees had been exposed to the same hazard (respondent merely stipulated that the alleyway was not used as a workarea or as a passageway and that he had no reason to believe that the deceased employee would be in the area). Therefore, it is clear that the isolated event defense cannot be used as a ground for vacating the citation in the instant case.

5/ Section 17(k) states:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a

(Continued)

- 9 -

but is only required to show that the employer could have known of the hazard with the exercise of reasonable diligence. It is clear that in the instant case, the employer could have known that employees might be in the alleyway with the exercise of reasonable diligence, i.e. by simply providing minimal supervision of the dumping area. The Judge's conclusion that respondent could not have reasonably known of the presence of employees in the alleyway since employees had no reason to be in this area does not withstand scrutiny. The point which the Judge does not discuss is that the record clearly establishes that employees had access to the alleyway. Given this fact, it is irrelevant that employees might go into the alleyway for their own personal purposes rather than for purposes relating to job assignments. Certainly, in view of the hazard created by the dumping operation, it is not unreasonable to expect that before dumping the bricks, respondent would have made some effort to find out whether employees were in the alleyway.

Third, the record established that respondent failed to render its workplace "free" of the recognized hazard. As noted earlier, the stipulated record shows that respondent did not take measures to protect employees such as using an enclosed chute for dropping discarded bricks, placing warning signs in

Cont.

5/

condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

appropriate places, or restricting employee access to the area into which the bricks were dropped. In essence, respondent apparently argues that since no accident had occurred in the past, no accident would occur in the future, and it was therefore unnecessary to take any precautionary measures. This argument is clearly without merit. Despite the lack of history of previous accidents, the accident in the instant case was reasonably foreseeable, since employees had access to the dumping area and since the dumping operation was conducted in a way that would not put employees on guard, i.e. the dumping operation was not conducted on a continuous basis and therefore an employee could walk into the alleyway without realizing that he was exposing himself to an imminent danger of being struck by falling bricks.^{6/} The court in Brennan v. Occupational Safety and Health Review Commission and Vy-Lactos Laboratories, supra, made it clear that in order to comply with the requirements of Section 5(a)(1), an employer must take "reasonable precautionary steps to protect his employees from reasonably foreseeable 'recognized hazards'" (464 F.2d at 463). The court emphasized that the employer must take the appropriate precautions,

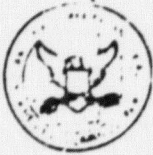
^{6/} Given this background, the Judge's reliance on the deceased employee's 27 years of experience with respondent must be discounted. Since respondent relined its kiln only four times per year, it is conceivable (if not probable) that an employee would not be aware that a dumping operation was planned for any particular day.

even though he does not anticipate that an accident will occur.

A violation occurs whenever an employer fails to take reasonable precautionary steps to protect his employees from reasonably foreseeable "recognized hazards" that are causing or are likely to cause death or serious physical injury. Thus, even if the three deaths and two serious injuries involved here were actually the result of an unforeseeable chemical reaction Vy Lactos may still have been in violation of the general duty clause because of its self-admitted failure to take any precautionary steps whatsoever to protect its employees from the hazard of hydrogen sulfide accumulations that is now apparent.

494 F.2d at 463

Since, in the instant case, respondent failed to take any precautionary measures, it is clear that the requirements of Section 5(a)(1) have not been met.



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, NW
WASHINGTON, D C 20006

CERTIFIED # _____
RETURN RECEIPT REQUESTED

IN REFERENCE TO SECRETARY OF LABOR v.

MARQUETTE CEMENT MANUFACTURING COMPANY

OSAHRC
DOCKET NO. 4725

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

Francis V. LaRuffa
Regional Solicitor
U. S. Dept. of Labor
1515 Broadway
Room 3555
New York, New York 10036

TO wit: See Attached.

FOR EMPLOYER

George W. Moehlenhof, Esq.
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FOR EMPLOYEES

Robert Wynne, President
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Route 1 - Box 432A
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FOR THE COMMISSION

William S. McLaughlin

WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

Judge William E. Brennan, OSHRC
PRESIDENTIAL BUILDING
6525 Belcrest Road
Suite 1005
Hyattsville, Maryland 20782

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant

v.

MARQUETTE CEMENT MANUFACTURING COMPANY,

Respondent

OSHRC DOCKET NO. 4725

DECISION

Before BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BARNAKO, Chairman:

A September 24, 1974 report of Review Commission Judge William E. Brennan is before this Commission for review pursuant to 29 U.S.C. § 661(1). The report vacates an alleged violation of 29 U.S.C. § 654 (a)(1). ^{1/} We affirm.

Complainant's citation alleged a violation of 29 U.S.C. § 654 (a)(1), the so-called general duty clause of the Occupational Safety and Health Act of 1970. The charge, however, was amended by the

^{1/} The section provides that each employer "...shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

complaint to allege that respondent violated 29 U.S.C. § 654(a)(2), the Act's so-called special duty clause, by failing to comply with the occupational safety and health standard codified at 29 C.F.R. § 1926.852(a).^{2/} The Judge decided the case on the basis of a stipulation of facts by the parties in which it was agreed that the issues before the Commission were whether the respondent was properly cited for failing to comply with § 1926.852(a) and whether the proposed penalty was appropriate. In complainant's Memorandum of Law to the Judge, which was filed after the stipulation, a motion in the alternative was tendered to amend the charge so as to once again allege a violation of 29 U.S.C. § 654(a)(1). Pursuant to Fed. R. Civ. P. 15(b),^{3/} the motion was granted. This was error.

Rule 15(b) provides:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings...."^{4/}

Thus, no amendment will be granted thereunder unless express or implied consent can be found.^{5/}

^{2/} The Judge subsequently determined that this construction standard was inapplicable because the work in issue was not "work for construction, alteration, and/or repair" within the meaning of 29 C.F.R. § 1910.12(b). We agree.

^{3/} 29 C.F.R. § 2200.2(b) requires the application of these procedural rules in the absence of a specific Commission rule.

^{4/} Rule 15(b) can also apply to conform the pleadings to evidence objected to but allowed at the hearing. However, this part of the rule is inapposite to the instant situation.

^{5/} See, e.g., Systems, Inc. v. Bridge Electronics Co., 335 F.2d 465 (3rd Cir. 1964).

Nothing in the record before us establishes an express consent by the respondent to amend the pleadings to a § 654(a)(1) charge or any issues related thereto. To the contrary, it expressly objects in its trial and review briefs to such amendment.

Likewise, consent cannot be implied. Under Rule 15(b), implied consent will only be found when the party against whom the amendment is sought was fairly apprised that the unpleaded charge was in issue. Niedland v. United States, 338 F.2d 254, 258 (3rd Cir. 1964); Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 842, (D. C. Cir., 1950). If both parties introduce evidence relevant to the amended charge, or if such evidence is introduced without objection, this indicates that the parties consented to trial of the issue. Petersen v. Klos, 426 F.2d 199, 202-203 (5th Cir. 1970); Arkla Exploration Co. v. Boren, 411 F.2d 879, 883 (8th Cir. 1969); Niedland v. United States, *supra*. But it must appear that the parties understood that such evidence went to the amended charge, and was not introduced solely because it was relevant to another issue being tried. Freitag v. The Strand of Atlantic City, 205 F.2d 778, 781 (3rd Cir. 1953); Simms v. Andrews, 118 F.2d 803, 807 (10th Cir. 1941).

Here, the parties stipulated to the facts. At that time the only pending charge was the alleged noncompliance with § 1926.852(a). The first indication of the amendment occurred thereafter - in complainant's brief to the Judge. Allowing an amendment at this late stage of the proceeding not only implies consent by the respondent when

there has been none, but could prejudice the respondent by not allowing it an opportunity to introduce rebuttal evidence on elements of a § 654(a)(1) violation which are not part of a § 654(a)(2) charge, such as whether the alleged violative condition constituted a recognized hazard.

Although we have concluded that it was error for the Judge to allow the amendment, we agree with the Judge's finding that the evidence of record does not establish a violation of § 654(a)(1) for the reasons given by him. Accordingly, the error was not prejudicial, and the Judge's disposition on the merits is affirmed.

FOR THE COMMISSION:

William S. McLaughlin
WILLIAM S. McLAUGHLIN
Executive Secretary

DATE: JAN 27 1976

MORAN, Commissioner, Concurring: 301

I agree with Chairman Barnako's opinion. However, since it relies in part on a finding by Judge Brenuan, his decision is attached hereto as Appendix A.

CLEARY, Commissioner, DISSENTING:

I dissent from the findings by my colleagues that no violation of section 5(a)(1) of the Act was shown on the facts of this case and that the Administrative Law Judge erred in granting the Secretary of Labor's motion to amend the pleadings pursuant to Rule 15(b)^{6/} of the Federal Rules of Civil Procedure.

Respondent operates a cement manufacturing plant located in Catskill, New York. The stipulated facts establish that one of respondent's employees was killed when he was struck by debris which had been dropped outside the exterior wall of one of respondent's buildings 26 feet into an alleyway. The debris was dropped into the alleyway as a result of respondent's procedure for relining a kiln used in the manufacture of cement products. Four times per year, respondent removes worn brick, which line the interior of the kiln and replaces them with new bricks. In the instant case, after removing the worn bricks from the kiln, which is located on the second floor of the Kiln Building, respondent dropped them out of an opening in the building's exterior wall. Respondent discarded the worn bricks without using an enclosed chute and without blocking off the area into which they were dropped.

On the merits the majority affirms the findings by the Judge that no "recognized hazard" existed at respondent's workplace and that it was not shown that respondent knew or reasonably could have known that the described condition could result in serious physical harm to its employees.

^{6/} The application of Rule 15(b) depends upon the Commission's Rule 2(b), 29 CFR §2200.2(b), that reads as follows:

(b) In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure (emphasis added).

It is well established that to prove a violation of the general duty clause, the Secretary must show (1) that the employer failed to render its workplace "free" of a hazard, (2) that the hazard was "recognized", and (3) that it was "causing or likely to cause death or serious physical harm." National Realty & Const. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1265 (D.C. Cir. 1973). An employer's actual knowledge of a hazardous condition satisfies the general duty clause requirement of recognition. Brennan v. O.S.H.R.C. and Vy Lactos Laboratories, Inc., 494 F.2d 460, 464 (8th Cir. 1974).

Paragraphs 6 through 9 of the jointly stipulated facts clearly establish each of the elements of a violation of section 5(a)(1) of the Act.

6. Respondent disposes of debris resulting from the demolition of the kiln brick by dropping the material outside the exterior wall into the alleyway between the Kiln Building and the Crane Storage Building by means of an unprotected chute approximately 26 feet above the ground.

7. Respondent did not provide any protection to employees working near the alleyway between the Kiln Building and the Crane Storage Building from hazards created by falling bricks. Protective devices such as danger signs, barricades or an enclosed chute were not provided as a means of preventing employee exposure to falling bricks.

8. At approximately 8:45 p.m. on August 29, 1973, Respondent's employee, Frank F. Rysavy, while in the alleyway separating the Kiln Building and the Crane Storage Building, was struck by a large quantity of debris being dumped out the chute from the interior of the Kiln Building. Mr. Rysavy was

killed immediately as a result of a crushed skull caused by the falling bricks.

9. The condition of said chute described above was known to Respondent's representatives.

The dumping of bricks into an unprotected alleyway from a height of 26 feet is a patent hazard to anyone below. The evidence establishes that employees had access to the alleyway, and their presence there was foreseeable. There also can be no doubt regarding the seriousness of potential injuries. This is regrettably demonstrated by the death of an employee on August 29, 1973.

I disagree also with respect to the majority's dicta that the Judge erred in granting the motion of the Secretary of Labor to amend the pleadings to allege a violation of the general duty clause pursuant to Rule 15(b) of the Federal Rules of Civil Procedure.

Section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. §551 et seq., is applicable here by virtue of section 10(c) of the Act.^{7/} It requires that the parties be put on notice of the issues in controversy. The "key to pleading in the administrative process is nothing more than opportunity to prepare." Davis, Administrative Law Treatise, §8.4 (1958). If no prejudice ensues to the adverse party, the shifting of legal theories is permissible. N.L.R.B. v. Pecheur Lozenge Co., 209 F.2d 393, 402 (2d Cir. 1953), cert. denied 347 U.S. 953 (1954).

The history of this case from the outset may be described as an effort by the parties to determine whether the general duty clause or the standard at 29 CFR §1926.852(a) is applicable. The stipulated issue on the

^{7/} By its own terms, Commission Rule 2(b) does not apply the Federal Rules here. The "specific provision" makes applicable section 5(b)(3) of the Administrative Procedure Act. See note 1.

applicability of the cited standard simply reflects this problem. The stipulated facts regarding the hazard and accident are unrelated to the characterization of respondent's activities as construction or manufacturing. To decide a case, as the majority suggests it would here, upon the formal wording of the stipulation is contrary to the purpose of notice pleading.

Because respondent alleges in its brief before the Commission that it would be prejudiced by the allowance of the amendment here, I would remand the case for the presentation of evidence to that effect. In any event, the Judge's granting of the amendment should not be reversed upon the mere allegation of prejudice.